Supreme Court, U.S.
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No. 00-298

IN THE

Supreme Court of the United States

PAUL BIGHAM,

Petitioner,

v.

LADDIE HUFFMAN, SHERIFF OF CLAY COUNTY, MISSISSIPPI, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
Relevant Factual Elements	1
Perceived Misstatements Of Fact Or Law In The Petition That Bear On What Issues Properly Would Be Before The Court If Certiorari Were Granted.	4
Reasons for Denying the Writ	6
I. The District Court's Decision And Fifth Circuit's Affirmance Thereof Are Not Inconsistent With *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097 (2000).	7
II. *Reeves*, Which Explains The Sufficiency Of Evidence Required To Sustain A Discriminatory Treatment Case, Has No Application To This Non-Discrimination, Non-Title VII Case.	9
III. The Facts Of This Case Do Not Give Rise To Any Inference Of Discrimination.	11
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982) 10

McDonnell Douglas Corp., 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) 8, 9, 10

Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097 (2000) 5, 6, 7, 8, 9, 10, 11

Scott v. University of Mississippi, 148 F.3d 493 (5th Cir. 1998) 8

Sherrod v. American Airlines, Inc., 132 F.3d 1112 (5th Cir. 1998) 10

Stafford v. True Temper Sports, 123 F.3d 291 (5th Cir. 1997) 8

Statutes:

29 U.S.C. § 621 *et seq.* 9

Mississippi Code Annotated § 19-25-69 ..... 2, 3

United States Constitution:

First Amendment 1, 6, 10, 12

Rule:

Federal Rule of Civil Procedure 56 11

STATEMENT OF THE CASE

Relevant Factual Elements

In 1992, Respondent Sheriff Laddie Huffman hired Petitioner Paul Bigham as chief deputy of the Clay County, Mississippi Sheriff's Department. Because of Petitioner's poor job performance and many problems he caused, Respondent Huffman terminated Petitioner's employment in 1995. This is not an employment case, however, but is a case alleging wrongful arrest/First Amendment retaliation. Over the next two years, Petitioner wrote a number of derogatory "letters to the editor" about Respondent Huffman in a local "tabloid" newspaper which assailed Respondent's character and accused Respondent of misconduct in office.

During this same two-year period, Petitioner repeatedly came upon the Clay County jail premises to harass inmates. (R. 209-210). For example, Petitioner cursed at inmates and threatened inmates by saying that he would have them sent to the state penitentiary. (R. 209-210). Further, Petitioner harassed inmates by disrupting their work and sleep by repeatedly walking and driving upon a restricted driveway area behind the Clay County jail building. (R. 209-210).

This driveway is located immediately behind the Clay County jail building and is situated exclusively upon Clay County property. (R. 193-94, 201-202). Such driveway serves as the only means of access to the back of the Sheriff's Department/jail building and is the entry point for new inmates to be brought into the jail for booking following arrest. (R. 196-97). Such driveway is separated from an inmate work area only by a chain link fence. (R. 196-97). This driveway is a restricted area not open for public use

because of the danger that members of the public could pass weapons or contraband to inmates through the chain link fence, and because of the danger that inmates could pose to members of the public. Petitioner knew that the driveway was not open to public use, for he himself, while chief deputy, told people not to walk upon it. (R. 133-34).

Although Petitioner refers to this driveway as a "street," such is clearly a misstatement of the true character of the driveway. Clay County land records show that the driveway is located upon property owned by Clay County, and upon which is situated the Clay County jail. (R. 201). This was admitted by Petitioner in his deposition. (R. 152). Such driveway does not appear on any land map or plat of Clay County or the City of West Point, Mississippi (where the jail is located). (R. 201). In fact, the parties stipulated in the Pre-Trial Order that the driveway has never been dedicated as a public street or county road. (R. 345). Contrary to Petitioner's argument, this driveway is clearly *not* a public street.

Respondent Huffman repeatedly warned Petitioner not to come upon the driveway behind the jail building or he (Petitioner) would be arrested for trespassing. (R. 148, 197). Respondent Huffman gave such warnings under the authority granted to him by Mississippi Code Annotated § 19-25-69 (1972, as amended), which places upon sheriffs the duty to preserve the premises of the county jail from trespassers and intruders. In various "letters to the editor," Petitioner admitted to having received these warnings. (R. 163, 169).

On July 9, 1997, Petitioner again walked upon the driveway, stopped, and harassed inmate Jessie Minnefield. (R. 136, 139-45, 212). Respondent Huffman once more

warned Petitioner that if he (Petitioner) came upon the driveway again, he would be arrested for trespassing. (R. 148, 188, 212). Petitioner left the area but returned within a matter of minutes in his truck. (R. 144, 212). Because Petitioner again refused Respondent Huffman's warnings to cease trespassing upon the driveway behind the jail building, Respondent Huffman discharged his statutory duty under Miss. Code Ann. § 19-25-69 and arrested Petitioner for trespassing and disorderly conduct — failure to obey the request or command of a law enforcement officer. Petitioner claims that retaliation can be inferred because his arrest occurred "the day after he had written his latest letter to the editor criticizing the Sheriff." (Pet. 8). To the contrary, the Record actually reflects that although Petitioner had been writing letters for nearly two years, Petitioner had not written a letter in the ten-week period preceding his arrest. (R. 352).

Following Petitioner's arrest, he was booked and placed into the Clay County jail. Petitioner was released the following day. Although Petitioner was not brought to trial for the offenses of trespassing and disorderly conduct, the reason therefor had nothing to do with the merits of the charges. It appears that in transferring Petitioner's case from the Clay County Justice Court to the district attorney, which transfer was due to Petitioner's assertion of a conflict of interest with the county prosecutor, Petitioner's criminal file was either not transferred or not received by the district attorney. (R. 203, 207, 211). What is clear is that there was *never* a decision made by either the county attorney or district attorney to dismiss the case or drop the charges against Petitioner. (R. 204, 207-08). Respondent Huffman took all the ordinary and necessary steps to have Petitioner prosecuted on the trespass and disorderly conduct charges, (R. 199, 206-07), and once such was done, Petitioner's prosecution was out of Respondent's hands.

Following his arrest for trespassing and disorderly conduct, Petitioner continued writing "letters to the editor" critical of Respondent Huffman. (R. 352-53). In fact, Petitioner published another article about Respondent on July 16, 1997, one week after his arrest. (R. 352).

PERCEIVED MISSTATEMENTS OF FACT OR LAW IN THE PETITION THAT BEAR ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT IF CERTIORARI WERE GRANTED.

The instant Petition is based upon a number of misstatements of fact. The first is Petitioner's patently false statement concerning the time period which elapsed between Petitioner's speech and arrest. Petitioner claims an inference of intentional retaliation arises because "Bigham was arrested the day after he had written his latest letter to the editor criticizing the Sheriff's illegal activities." (Pet. 3; *See also* Pet. 8, 9). Not surprisingly, Petitioner includes no record citation for this statement. In truth, *ten weeks* elapsed between the date of Petitioner's last article criticizing Respondent Huffman (April 30, 1997) and the date of Petitioner's arrest (July 8, 1997). (R. 351-54). Clearly there is no basis for an inference of intentional retaliation.

The second misstatement of fact forms the foundation of this Petition for Writ of Certiorari. Petitioner misstates the District Court's opinion, alleging his First Amendment claim was dismissed for failure to produce "direct evidence" that Petitioner's speech was the cause of his arrest. (Pet. 4-5). Petitioner even states that the Fifth Circuit, which adopted the lower court's opinion in a per curiam decision, "held" that First Amendment retaliation cases required direct

evidence in the form of "statements" or "documents." (Pet. 5-6). As this Honorable Court can clearly see, the District Court's opinion dismissed Petitioner's First Amendment claim, not because Petitioner presented no "direct evidence," but because Petitioner presented no evidence at all that his speech played a role in his arrest. (Pet. App. 6-7). Because Petitioner failed to produce any competent evidence or any genuine issue of material fact that the exercise of his First Amendment rights was a substantial or motivating factor in his arrest, the District Court properly concluded that Petitioner failed to establish a prima facie case of retaliation. (Pet. App. 6-7).

As noted *supra*, Petitioner also misstates the status of the driveway upon which Petitioner trespassed by referring to same as a "public street," "street" or "road." (Pet. 3-4, 6). As Petitioner stipulated in the Pre-Trial Order, however, "The driveway used as a means of reaching the rear entrance of the Clay County Sheriff's Office/jail building has never been dedicated as a public city street or a public county road." (R. 345).

In addition to the foregoing misstatements of fact, Petitioner also makes a misstatement of law that this Court will readily recognize. Petitioner asserts that *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097 (2000), an employment discrimination case, holds that "indirect evidence is sufficient to prove discriminatory intent." (Pet. 5). *Reeves* does not so hold. Rather, *Reeves* makes clear that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude

that the employer unlawfully discriminated." *Reeves*, 120 S. Ct. at 2109. *Reeves* simply does not stand for the proposition Petitioner asserts.[1]

REASONS FOR DENYING THE WRIT

Although stated in two different ways, the sole question presented by the Petition is whether direct evidence is required to prove First Amendment retaliation. This question, however, has already been answered. Direct evidence clearly is *not* required to prove a retaliation case, just as direct evidence is not required to prove a discrimination case. There is no dispute that such claims can be established solely with circumstantial or indirect evidence. A plaintiff must, however, present *some* evidence of retaliation or discrimination. This is where Petitioner's case fails, for Petitioner failed to come forward with any document, statement, exhibit, action, or other form of competent evidence, either direct or indirect, which would demonstrate or give rise to an inference of retaliation. In fact, Petitioner presented no more than his own conclusory allegations of retaliation. Thus, as a matter of law, Petitioner failed to establish his *prima facie* case of retaliation. Summary judgment was therefore properly entered by the District Court and properly affirmed by the Fifth Circuit. Respondent respectfully submits that the Writ should be denied.

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1. Petitioner's counsel was counsel of record in *Reeves*.

I.

THE DISTRICT COURT'S DECISION AND FIFTH CIRCUIT'S AFFIRMANCE THEREOF ARE NOT INCONSISTENT WITH *REEVES v. SANDERSON PLUMBING PRODS., INC.*, 120 S. CT. 2097 (2000).

Petitioner's entire case is based upon erroneous readings of both *Reeves v. Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097 (2000), and the District Court opinion in the instant case. Petitioner claims that *Reeves* "holds that indirect evidence *is* sufficient to prove discriminatory intent." (Pet. 5) (emphasis in original). There are a number of errors with Petitioner's statement. First and foremost, this is not the holding of *Reeves*. *Reeves* held that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 120 S. Ct. at 2109. Nothing in *Reeves* abrogates a plaintiff's responsibility to prove his case with competent evidence. Nothing in *Reeves* allows a plaintiff to proceed to trial solely upon "conclusory and insufficient allegations," which are all Petitioner produced. (Pet. App. 7). In short, nothing in *Reeves* entitles a plaintiff to a trial where he can produce no competent evidence of retaliation. In fact, *Reeves* explicitly states that a plaintiff must initially prove his *prima facie* case and then offer sufficient evidence to find the employer's stated reasons for the decision false, neither of which Petitioner has done in the instant case.

Petitioner sounds the alarm that this Court must stop the Fifth Circuit from continuing to require Plaintiffs to produce "direct evidence." In reality, however, such cry is disingenuous, for the Fifth Circuit clearly does not require plaintiffs to come forward with direct evidence in discrimination or retaliation cases. *See Scott v. University of Mississippi*, 148 F.3d 493, 504 (5th Cir. 1998) (noting plaintiff need not provide direct evidence to sustain jury finding of discrimination); *Stafford v. True Temper Sports*, 123 F.3d 291, 295 (5th Cir. 1997) (finding retaliation claim can be proven with circumstantial evidence).[2] Furthermore, the entire *McDonnell Douglas* burden shifting framework is designed for discrimination cases involving only circumstantial evidence. *Reeves*, 120 S. Ct. at 2105. Thus, when Petitioner presents the question to this Court of whether "First Amendment retaliation cases can be proven by indirect evidence," (Pet. i), the already clear answer to the question under longstanding case law is "yes." Such an affirmative answer, however, does not help this Petitioner's case.

The instant case is not one of direct evidence versus indirect evidence, but rather, is a case of *no evidence at all*. Petitioner wants the jury to "infer" discrimination, but comes forward with no evidence from which to make such an inference. Petitioner's cry of "jury trial" and "reasonable inferences" cannot negate the fact that Petitioner has come forward with no competent evidence to support his claims. Because Petitioner presented no evidence at all that his arrest was motivated by his speech, the District Court properly concluded that Petitioner failed to establish his *prima facie*

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2. Petitioner's counsel served as counsel in both the *Scott* and *Stafford* cases.

case. (Pet. App. 6-7). Through adopting the District Court opinion, the Fifth Circuit also recognized Petitioner's complete failure to come forward with any competent evidence, direct or indirect, to substantiate his claim of First Amendment retaliation. (Pet. App. 6-7). Because Petitioner's failure to come forward with any evidence to support his claims is fatal to his case, Petitioner failed to demonstrate the existence of any genuine issue of material fact, thereby making summary judgment appropriate.

II.

REEVES, WHICH EXPLAINS THE SUFFICIENCY OF EVIDENCE REQUIRED TO SUSTAIN A DISCRIMINATORY TREATMENT CASE, HAS NO APPLICATION TO THIS NON-DISCRIMINATION, NON-TITLE VII CASE.

Reeves, of course, was an employment discrimination case arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. In discriminatory treatment cases, the burden shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), is employed in the order for presentation of proof. *Reeves*, 120 S. Ct. at 2106. Under *McDonnell Douglas*, once the plaintiff proves a *prima facie* case and the defendant then satisfies its burden of articulating legitimate, nondiscriminatory reasons for its employment decision, the burden shifting framework disappears and the sole remaining issue becomes "discrimination *vel non*." *Id.* The *Reeves* case had reached this final stage of proving discrimination, and the issue before this Court was the sufficiency of the evidence required to

establish discrimination at this third level. Therefore, *Reeves* was an explanation of the *McDonnell Douglas* burden shifting framework in discrimination cases.

McDonnell Douglas itself made clear that it addressed "the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253." *McDonnell Douglas Corp.*, 411 U.S. at 793. *See also Reeves*, 120 S. Ct. at 2106 (noting *McDonnell Douglas* establishes allocation of burden of production and order of proof in *discriminatory treatment cases*). The instant Petition, however, does not involve a Title VII case, but rather, is a First Amendment retaliation case. As such, *McDonnell Douglas* does not apply. *See Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121-22 (5th Cir. 1998) (noting *McDonnell Douglas* analysis applies to Title VII discrimination cases, not retaliation claims founded upon violations of constitutional rights); *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982) (noting doubt exists over whether First Amendment retaliation case is ever properly analyzed under *McDonnell Douglas*). Because *McDonnell Douglas* has no application to this First Amendment retaliation case, the holding of *Reeves*, which explains the *McDonnell Douglas* analysis, likewise does not apply.

Even if the holding of *Reeves* did have application to the instant case, *Reeves* is clearly distinguishable, despite Petitioner's assertion to the contrary. (Pet. 6). *Reeves* involved a discrimination claim analyzed under the burden shifting analysis of *McDonnell Douglas*, while the instant case does not involve discrimination or *McDonnell Douglas*, but rather involves a claim of First Amendment retaliation. Additionally, while the *Reeves* plaintiff clearly established a *prima facie* case of discrimination,

the Petitioner herein did not establish a *prima facie* case of retaliation. Further, in the instant case, probable cause existed to arrest Petitioner because Petitioner clearly and willfully committed the offenses of trespassing and disorderly conduct in Respondent Huffman's presence, which violations of law justified Petitioner's arrest. Without question, *Reeves* is distinguishable from the instant case. This Petition, which is solely based upon *Reeves*, should not be granted.

III.

THE FACTS OF THIS CASE DO NOT GIVE RISE TO ANY INFERENCE OF DISCRIMINATION.

What Petitioner asks of this Court is to allow a plaintiff, under the guise of "drawing reasonable inferences," to avoid summary judgment and reach the jury in all cases, whether or not that plaintiff has produced any evidence to support his claim. This much is clear from the last three pages of Petitioner's argument which relate not to the facts of this case, but merely criticize Rule 56 of the Federal Rules of Civil Procedure and the Fifth Circuit Court of Appeals.

The only evidence Petitioner cites in his Petition to support the drawing of any inference of retaliation is again, not evidence at all, but merely two patently false, "conclusory and insufficient allegations." (Pet. App. 7). Petitioner claims "Bigham was arrested the day after he had written his latest letter to the editor criticizing the Sheriff's illegal activities." (Pet. 8). Such statement is undeniably false, for the last letter Petitioner wrote prior to his arrest on July 9, 1997, was a letter published on April 30, 1997, *ten weeks* prior to his arrest. (R. 351-54). The only other claimed basis for an inference of retaliation is Petitioner's

statement that he "was arrested for being on property which everyone else is free to use." (Pet. 8). This statement likewise has no basis in fact. Petitioner admitted in his deposition that he, while chief deputy, told people not to walk upon the driveway behind the Clay County jail building. (R. 133-34). Moreover, Petitioner stipulated in the Pre-Trial Order that the driveway had never been dedicated as a public street or county road. (R. 345). Petitioner therefore has come forward with no evidence sufficient to support an inference of retaliation.

The District Court correctly concluded that Petitioner failed to come forward with any competent evidence. Rather, Petitioner offered only conclusory and insufficient allegations to support his claim of First Amendment retaliation. Despite Petitioner's protestations, the record is clear that he has produced no evidence from which any reasonable inference of retaliation may be drawn. Clearly, then, the District Court did not err in granting Respondent's Motion for Summary Judgment and the Fifth Circuit did not err in affirming such judgment.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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